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A REVIEW OF MONTANA LAW

January 1996

Prepared by Doug Sternberg, Legal Researcher,

Montana Legislative Services Division

for the

Joint Oversight Committee on Children and Families

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BACKGROUND

This report has been prepared at the request of the 1995-96 Joint Oversight Committee on Children and Families to provide the Committee with an overview of the legal background of Montana law regarding child custody and visitation.

SCOPE OF REPORT

This report examines the historical development to the present of Montana statutory law in the areas of child custody and visitation, including applicable case law in those areas, and an examination of joint custody and grandparent visitation. The report is not intended to provide an exhaustive examination of the issue of child support or child support enforcement, except in areas in which that issue incidentally affects custody and visitation; neither does the report detail the specific provisions of the Indian Child Welfare Act of 1978 or attempt to explain the interaction of that Act with general state law.

STATUTORY DEVELOPMENT

The developing body of Montana child custody and visitation law spans a period of many years and includes several fundamental changes in philosophy and policy regarding family law. Much of the recent law has developed in response to specific societal conditions, such as domestic violence and abuse of children, as the Legislature has attempted to address those issues as a matter of public policy.

Prior to 1975, a marriage could be dissolved or annulled because consent had been gained by fraud or force,[1] because the parties were related by blood or either party was feebleminded,[2] because a former marriage had not been annulled or dissolved or a spouse was absent for 5 consecutive years,[3] because of a promise made in ignorance of one party's want of personal chastity or because of unchaste conduct,[4] or because a party was under the age of legal consent, bigamous, of unsound mind, or physically incapable of entering into the married state.[5] The only statutory provisions for the care of children of an annulled marriage ensured legitimacy and succession to the parents' estate[6] and, in cases of marriage annulled on the ground of fraud or force, required the court to award custody to the "innocent" parent and allowed provisions for the children's education and maintenance out of the property of the "guilty" party.[7] Courts had, through litigation,

established certain other powers in determining custody and visitation[8] and were able to address the mental health of the contesting party as a factor in the award of custody,[9] but those powers had not been incorporated into statute.

The 1963 Legislature adopted a statement of public policy regarding the state's interest in promoting the stability and best interest of marriage and the family and providing recognition that impairment or dissolution of marriage generally results in injury to the public as well as to the parties themselves.[10] The statement extended even to requiring notice of this policy, in the form of a card provided by the court, to parties contemplating marriage.[11] Consistent with this newly recognized policy, the 1963 Legislature adopted the Montana Conciliation Law,[12] the purpose of which was to "protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies".[13] The Law set up conciliation courts and gave them jurisdiction to mediate when there were controversies that existed between the spouses and that, unless a reconciliation could be achieved, might result in the dissolution or annulment of the marriage or in the disruption of the household and when there was any minor child of the spouses or of either of them whose welfare might be affected.[14] Also in 1963, a law was enacted providing that a marriage license could not be issued to a party who was delinquent in meeting support obligations to existing dependents if the party was financially able.[15] The provisions for custody and maintenance of children of annulled marriages, enacted initially as part of the Civil Code of 1895, were repealed in 1963.[16]

The 1975 Legislature addressed the issues as part of the adoption of the Uniform Marriage and Divorce Act as recommended by the National Conference of Commissioners on Uniform State Laws.[17] The Uniform Marriage and Divorce Act of 1975 constituted a distinct departure from family law of the past, both in allowable grounds for divorce and in the manner of dealing with children of failed marriages. An integral part of the Uniform Act was the concept of "no-fault divorce". The necessity for a party to show specific grounds for dissolution, i.e. mental infirmity, unchastity, etc., was replaced by the concept of dissolution based on the fact that a marriage was "irretrievably broken", meaning that the parties had lived separate and apart for more than 180 days or that there was serious marital discord that seriously affected the attitude of either party toward the marriage.[18] A finding of irretrievable breakdown was a determination that there was no reasonable prospect of reconciliation.[19]

Of greater significance to the context of this report, the new law specifically required the court to consider, approve, and make provision for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property.[20] The law required that a dissolution petition set forth any arrangements as to support, custody, and visitation of the children.[21] The law allowed appointment of a legal representative, in the form of a guardian ad litem, to represent the interests of a minor dependent child with respect to the child's support, custody, and visitation.[22] The law established a new test for determining custody, based on the "best interest of the child".[23] Under the test, the court had to consider all relevant factors, including but not limited to the wishes of the child's parent or parents as to custody; the wishes of the child as to a custodian; the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who may significantly affect the child's best interest; the child's adjustment to home, school, and community; the mental and physical health of all individuals involved; physical abuse or threat of physical abuse by one

parent against the other parent or the child; and chemical dependency or chemical abuse on the part of either parent. The statute also established several rebuttable presumptions with regard to the "best interest" standard, including the presumption that custody should be granted to the parent who has provided most of the primary care during the child's life; that a custody action brought by a parent within 6 months after a child support action against that parent was vexatious; that a knowing failure to pay birth-related costs that the person was able to pay is not in the best interest of the child; and that failure to pay child support that the person is able to pay was not in the best interest of a child in need of the child support.

There were also provisions made for temporary custody orders pending final custody determinations,[24] for court interviews of the child to ascertain the child's wishes as to a custodian and visitation,[25] for investigations and reports concerning custody arrangements in contested cases,[26] and for giving custody cases priority on the court docket, assessing costs in determining the child's best interest, granting closed hearings, and sealing custody records to protect the child's welfare.[27]

The 1975 law established statutory criteria for visitation, stating that a "parent who is not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health". Visitation could not be restricted unless there was a finding of serious endangerment, unless a noncustodial parent or other person residing in the noncustodial parent's household was convicted of certain crimes against a person, or unless the custodial parent or any other person who had been granted custody of the child pursuant to court order filed an objection to visitation with the court. As long as a noncustodial parent who had visitation rights under a decree or a custody agreement remained a resident of this state, a resident custodial parent was required, before changing the child's residence to another state and unless the noncustodial parent had given written consent, to give written notice of the change to the noncustodial parent.[28] If necessary, a party could request a temporary restraining order, for a period not to exceed 20 days, or a temporary injunction, for a period not to exceed 1 year, that could directly affect visitation in cases when a party might molest or disturb the peace of the other party or a family member, when physical or emotional harm would result, or when there was a possibility that a party might remove a child from the jurisdiction of the court.[29]

The custodian was given authority to determine the child's upbringing, including the child's education, health care, and religious training, unless the court after hearing found, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or the child's emotional development significantly impaired. In those cases, an appropriate state agency was allowed to exercise continuing supervision over the case to ensure that the custodial or visitation terms of the decree were carried out.[30]

To ensure some stability and consistency in a custody arrangement, the law provided specific criteria for modifying custody once the arrangement had been judicially determined. The court was allowed to modify a prior custody decree if it found, upon the basis of facts that had arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change had occurred in the circumstances of the child or the child's custodian and that the modification was necessary to serve the best interest of the child. The statute set out particular changes considered sufficient to warrant modification of custody, including circumstances in which (1) the custodian agreed to the

modification; (2) the child had been integrated into the family of the petitioner with consent of the custodian; (3) the child's present environment endangered seriously the child's physical, mental, moral, or emotional health and the harm likely to be caused by a change of environment was outweighed by its advantages to the child; (4) the child was 14 years of age or older and desired the modification; (5) the custodian willfully and consistently refused to allow the child to have any contact with the noncustodial parent or attempted to frustrate or deny the noncustodial parent's exercise of visitation rights; or (6) the custodial parent had changed or intended to change the child's residence to another state. Provision was also made for modification of custody in cases when a parent was convicted of certain crimes against a person.[31] In 1989, a provision was added to allow modification of visitation under similar circumstances.[32]

A 1979 law set out the process for determining custody when a custodial parent died, generally transferring custody to the noncustodial parent.[33] The 1979 Legislature also recognized the visitation rights of grandparents by allowing them to petition the court for reasonable visitation with a grandchild, except a child who was adopted by a person other than a stepparent or grandparent, if the visitation was found to be in the best interest of the grandchild.[34]

The 1981 Legislature adopted an important new policy with regard to custody, based on the California Civil Code and still applying the "best interest" standard, that sought to establish certain guidelines for resolution of custody disputes through the award of joint custody. The purpose was to ensure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing.[35] The law established a presumption that joint custody, if requested by either parent, was in the best interest of the child unless there was a finding that one parent physically abused the other parent or the child, and it defined joint custody as "an order awarding custody of the minor child to both parents and providing that the physical custody and residency of the child shall be allotted between the parents in such a way as to assure the child frequent and continuing contact with both parents". The time allotment was to be on as equal a basis as possible and was to be determined according to the practicalities of each case and with consideration of the effect of the time allotment on the stability and continuity of the child's education. Modification of joint custody was subject to the same standards as modification of sole custody.[36] The joint custody provisions also allowed a noncustodial parent access to certain records and information pertaining to the minor child.[37]

The 1993 Legislature passed family law mediation guidelines that echoed the Montana Conciliation Law of 1963 and that were tailored directly to disputes involving child custody, child support, visitation, maintenance, or property settlement.[38] The law allowed the District Court at any time to consider the advisability of requiring the parties to such a dispute to participate in confidential mediation of the case unless the court had reason to suspect that one of the parties or a child of a party had been physically, sexually, or emotionally abused by the other party.[39] The purpose of a mediation proceeding was to reduce the acrimony that may exist between the parties and to develop an agreement, outside the presence of the parties' attorneys if necessary, that was supportive of the best interest of any child involved in the proceeding.[40] An agreement reached by the parties as a result of mediation had to be discussed by the parties with their attorneys, if any, and the approved agreement could be submitted to the court. An agreement could not be submitted to the court if any party objected. The court could adopt the agreement.[41] The 1993 Legislature also added a provision allowing issuance of a temporary order or

injunction to prevent stalking.[42]

Also consistent with the developing new policy regarding family preservation and protection, the 1993 Legislature passed the Montana Family Policy Act,[43] formally adopting as state policy the support and preservation of the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children. The Act established a set of guiding principles intended to ensure the promotion of state services toward family support and preservation.[44]

Resembling the 1963 provision requiring persons contemplating marriage to recognize that the impairment or dissolution of a marriage generally results in injury to the public as well as to the parties themselves, a 1995 statute required the court to inform the parties in a dissolution or custody modification proceeding of available programs concerning the effects of dissolution of marriage on children and, if the court found that it would be in the best interest of the minor child, allowed the court to order the parties to attend a program.[45]

Thus, the statutory developments in Montana family law with regard to custody and visitation reflect the following trends: (1) in changing the legal grounds for divorce to a "no-fault" concept, the Uniform Marriage and Divorce Act has in effect made divorce easier and more socially acceptable, as evidenced by the steady rise in divorce rates since inception of the Act in 1975; (2) a corresponding recognition of the negative social effects of divorce has led to the adoption of a state policy that seeks to preserve the family and encourage mediation, but positive effects of that policy generally remain to be seen; (3) the state has progressively recognized the detrimental effects of divorce on children and sought to address those effects through adoption of the "best interest" standard, joint custody, child support enforcement, laws designed to reduce the impact of domestic violence on children, and the requirement that custody and visitation be addressed in each applicable divorce decree. Nevertheless, the very nature of family disputes as among the most personal and contentious of human interactions continues to affect the application of family law, often reducing it in essence to case-by-case determinations, as will be shown by an examination of case law, and problems continue to exist and develop as the state attempts to legislate and enforce these most intimate nuances of people's lives.

CASE LAW DEVELOPMENT -- CUSTODY

Although the letter of the custody and visitation laws might seem clear to the casual observer, questions that have arisen and been addressed by the courts as to the applicability of the laws have been as varied in situations and circumstances as there are families. Because the various states have reserved jurisdictional power to determine these issues, an attempt has been made to bring some consistency of application of custody and visitation statutes among the states through the adoption of the Uniform Child Custody Jurisdiction Act (UCCJA).[46] Because this report is not intended to be a comprehensive national overview of custody and visitation law, the case law cited is limited to the law in Montana.

It is a fact of modern society that people are very mobile, and it has been left to courts to interpret the UCCJA in deciding what happens when a custody decree is signed and one or both of the parties leaves the state or when a parent brings children to Montana

after a decree is signed in another state--which leads to the first potential problem in custody issues: the problem of jurisdiction. Under Montana law, a court of this state competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) this state is the home state of the child at the time of commencement of the proceedings or this state had been the child's home state within 6 months before commencement of the proceeding, the child is absent from this state because of removal or retention by a person claiming custody or for some other reason, and a parent or person acting as parent continues to live in this state; (2) it is in the best interest of the child that a court of this state assume jurisdiction because the child and the parents or the child and at least one contestant have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; (3) the child is physically present in this state and has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or (4) no other state has jurisdiction or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine custody of the child and it is in the child's best interest that the court assume jurisdiction. Except in cases of abandonment or when no other state has jurisdiction, physical presence in this state of the child or of the child and one of the contestants is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.[47]

The practical effect of the law is that jurisdiction over a custody action initially filed in Montana is generally retained by this state as long as one of the parties continues to have a significant connection to Montana. A recent court-established exception is when both parties move far from this state, making Montana an inconvenient forum, in which case Montana may concede jurisdiction to the child's new home state if that is in the child's best interest, regardless of whether one parent still has a Montana connection. This exception was held to be consistent with the intent of the UCCJA that litigation involving minor children should occur in the state in which the child has the closest connection and in which significant evidence concerning the child's care, protection, training, and personal relationships is most readily available.[48] Also, under Montana law, if a court of another state has made a custody decree, a court of this state may not modify that decree unless it appears to the court of this state that the court that rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with Montana statutes or that it has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.[49]

A divorce action is generally in rem as to the status of the parties (actions regarding questions of property) and in personam as to other matters (actions regarding questions of a personal nature). Thus, a Montana court did not need in personam jurisdiction to grant a dissolution to a Montana wife when the husband was living in Tennessee. The court could grant to the mother custody of children living in Montana but not of children living with the father in Tennessee because Montana is specifically granted jurisdiction to determine custody of children living in Montana. The Montana court could not award child support because the court did not have in personam jurisdiction over the father.[50] In an effort to curb parental child-snatching, a noncustodial parent's refusal to return a child to the custodial parent in another state does not toll the calculation of the 6-month period to establish a "home state".[51] Further, the mere fact that a parent seizes children in another state and brings them before a Montana court does not establish jurisdiction over the out-

of-state parent who has no contacts with Montana, and any attempt by Montana to exercise jurisdiction would be a violation of that parent's constitutional due process rights.[52]

It must also be noted that a different statutory standard applies to the initial establishment of custody than applies to cases of modification of a prior decree. Initially, the court examines the child's best interest to determine the most appropriate custody arrangement. The "best interest" standard has been applied to numerous fact situations when regarding questions of the mental health of the parents and supervised visitation,[53] a child's religious education,[54] the death of a custodial parent,[55] travel restrictions,[56] separating siblings,[57] and contested guardianships,[58] but the standard has been held not to apply in determining a permanent custody award to a nonparent unless the natural parents have forfeited their rights.[59] The welfare of the child is paramount to the child's custodial wishes.[60] Therefore, a court is not required to award custody based on a child's preference of custodial parent, but it must consider a child's preference only as one element of whether the custody is in the child's best interest.[61] Because the "best interest" standard has been held to apply to children of all ages, Montana no longer adheres to a "tender years" presumption; therefore, a mother is not to be considered the preferred parent in cases involving young children.[62] A court must consider each element of the "best interest" guidelines but need not make specific findings on each of the elements.[63]

Once initial custody has been determined, the burden on a parent who wishes to modify the arrangement becomes heavier through the application of a two-part test. The first part of the test has two subparts: (1) there must be a change in the circumstances of the child or the child's custodian; and (2) the change must be significant enough in relation to the best interest of the child that that interest is no longer served by the decree in force. The second part of the test is that the primary custodian may not be changed unless the statutorily enumerated dangers exist and the advantage of change outweighs the disadvantages.[64] In fact, the Legislature has determined that the value of bringing some stability to a custody situation is so important that sanctions are provided against a parent who pursues a modification action that is vexatious and constitutes harassment.[65]

The phrase "change of circumstances" means circumstances changed so substantially that the best interest and general welfare of the child can best be promoted by alteration of the decree.[66] Changed circumstances are based on the principle that the stability of home life of children is a vital factor to their well-being and that the turmoil of litigation must be minimized and sometime brought to an end.[67] Remarriage of the custodial parent is not a sufficient change of circumstance to require a change of custody without evidence that the remarriage is detrimental to the welfare of the child.[68] A change in circumstances requiring the child to change schools to one not in Montana has been held to be insufficient of itself to warrant modification.[69] Poor hygiene and a parent's questionable housekeeping skills have been held not to seriously endanger a child,[70] while frequent moves and the lack of a stable lifestyle have been found to be a sufficient change in circumstances to warrant modification.[71] Directly affecting the visitation issue, the fact that a custodial parent removes or intends to remove the child from the state is not in itself sufficient to warrant modification because by law a custodial parent is entitled to determine the child's residence unless the change would prejudice the rights or welfare of the child.[72] The fact that the child has been integrated into the family of the noncustodial parent has been held inapplicable in actions to modify an agreement, applying only to actions to terminate custody.[73]

However, some confusion has recently been added to the application of this standard. The Supreme Court held in a 1994 case that an effort to modify a sole custody provision or to terminate a joint custody provision must satisfy the "serious endangerment" standard and that a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the children, even though a joint custody designation is retained, must also satisfy that standard. The effect of the holding was that an effort to modify the physical custody arrangement in a joint custody decree that does not substantially change the child's primary residence may be considered under the "best interest" standard, but if modification of the child's primary residence is sought, the "serious endangerment" standard is to be applied.[74] Despite this holding, in a case decided a mere 4 days later, the Supreme Court affirmed a modification that had the effect of substantially changing the primary residence of the children, based on the "best interest" standard. Even though the District Court had wrongly applied the "best interest" standard instead of the "serious endangerment" standard, the court nevertheless allowed the modification because the children's best interest was served by splitting them up and because the mother had failed to object to the use of the wrong standard.[75]

CASE LAW DEVELOPMENT -- VISITATION

The same "best interest" standard applies to initial determination of visitation rights as applies to initial custody determinations. Visitation rights of a parent are merely incidents of custody, and the same principles that apply to custody apply to visitation rights as well.[76] It has been held that visitation may be used as a factor in awarding custody in cases when visitation interference has occurred in the past.[77] However, when there is no general presumption that either parent is more entitled to custody, there is a general presumption that the noncustodial parent is entitled to reasonable visitation unless it would not be in the child's best interest. What constitutes "reasonable" visitation rights is determined by the court on a case-by-case basis, given the circumstances of the parties. No general standard of reasonableness has been determined, although visitation should be defined allocating sufficient time for a meaningful relationship to be nurtured.[78] Nevertheless, the Supreme Court has held that a schedule of alternate weekends, alternate holidays, one evening a week, and 2 weeks in the summer was reasonable when both parties lived in Montana.[79] In a case in which the father lived in Alaska and the mother lived in Montana, a schedule was held to be reasonable that included liberal visitation for the father when he was in Montana, week-long blocks of time every 3 or 4 months at the father's home or other appropriate location provided that the child was accompanied by an adult family member when traveling, 14-day visitation blocks when the child was in elementary school, and increased visitation after the child entered junior high school.[80] A recent case also clarified the visitation rights of a primary custodial parent when the mother had primary custody during school months and the father had visitation rights during summer months, on weekends and alternating holidays, and at other reasonable times. The Supreme Court found that the father's custody in summer months actually qualified him as the custodial parent during that time and that the mother, as noncustodial parent in the summer, was entitled to reasonable visitation because there was no evidence that such visitation would endanger the children.[81]

There is no requirement that a specific visitation schedule be included in the decree. When parties indicate a willingness to allow visitation, they are generally granted latitude

to work out a mutually satisfactory solution and avoid the inherent difficulties of a hard and fast visitation schedule, and if visitation proves unworkable, the parties can return to District Court for clarification.[82] The wishes of the child are also subject to the same standard in visitation as in custody. The child's wishes must be considered by the court, and if those wishes are not followed, the court should state its reasons for not doing so.[83]

Another aspect of visitation that has been subject to ongoing litigation is the limitation of visitation rights. By statute, a court may not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health or unless a noncustodial parent or other person residing in the noncustodial parent's household has been convicted of deliberate homicide, mitigated deliberate homicide, sexual assault, sexual intercourse without consent, deviate sexual conduct with an animal, incest, aggravated promotion of prostitution of a child, endangering the welfare of children, partner or family member assault, or sexual abuse of children. Once a conviction has occurred, the burden is on the noncustodial parent to prove that visitation would not seriously endanger the child.[84] Unsubstantiated allegations of physical abuse[85] or potential harm from transvestism[86] are not sufficient to warrant limitations, but limitations have been affirmed in cases in which a child's best interest could be affected by travel,[87] by a parent's influence on the child's health,[88] by a parent's mental health,[89] by a parent's extensive involvement with drugs, by a comparatively affluent lifestyle without employment, by failure to complete inpatient treatment for chemical dependency,[90] and by failure of a parent to provide information concerning a child's whereabouts during visitation or to give priority to the child's scheduled activities.[91] A significant case held that placing conditions on visitation in an effort to curb a parent's behavior toward the children and foster a more healthy relationship did not amount to a termination of visitation rights or an abuse of court discretion.[92] The Supreme Court recently held that the imposition of a requirement that visitation be supervised is not considered a "restriction" within the statutory context.[93] Also, visitation has been allowed in some cases contingent upon a parent's compliance with certain conditions, such as current payment of child support when stipulated by the parties;[94] it has been allowed when the court believes that visitation should be supervised by the director of family court services[95] or by the father when grandparents exercise visitation;[96] and it has been allowed when a man who was found to be a child's father in a paternity suit subsequently sought visitation, even though he was a complete stranger to the child and was required to establish a relationship with the child before liberal visitation rights were granted.[97]

Courts have also addressed the relationship between the right to visitation and the obligation to pay child support, a question having been raised as to whether a noncustodial parent needs to pay child support if the custodial parent denies or inhibits visitation. The Supreme Court rejected a father's contention that he had no obligation to support his child under a divorce decree unless and until he exercised his visitation rights, holding that visitation has no bearing whatsoever on a parent's legal and moral obligation to support the child.[98] This principle clearly applies to actions brought under the Uniform Interstate Family Support Act, which states that payment under a support order may not be conditioned upon a party's compliance with visitation provisions.[99] Applying that principle, courts have held that a child's right to support and the parent's support obligation are not affected by misconduct of the parent or violations of visitation provisions of a custody decree.[100] The law takes the point even one step further in adoption cases, allowing for termination of parental rights without consent when a parent is able to provide

support but does not pay support for a period of 1 year.[101] Courts have consistently held that a parent should not be able to enjoy the benefits of parental rights while voluntarily shunning the burden of parental obligations.[102]

Despite this seemingly just principle of a child's entitlement to support, the staff has been made continuously aware of numerous cases of alleged abuses of visitation rights, complicated by this very principle that the courts have held to be in the child's best interest. Montana's child support enforcement statutes are among the most comprehensive in the nation, and to date Montana is the only state to comply with the federal mandate to have a certified automated support enforcement system in place. Nevertheless, the idea that the state takes such aggressive measures to enforce support, generally on behalf of the mother, while no corresponding enforcement of rights exists to ensure visitation, generally by the father, is viewed by some as a blatant inequity of the system, even to the point of suggestions of sexual bias. Although the joint custody law was originally presented as a way to cure prior sexual preferences in custody matters,[103] there may in fact be some latent holdover effects of the long-held presumption that custody of children of tender years should be granted to the mother, a principle arguably still embodied in the "best interest" standard presumption that custody "should be granted to the parent who has provided most of the primary care during the child's life".[104] This seeming inequity has been further aggravated by court decisions holding that a child is entitled to support by the noncustodial parent even if the custodial parent fails or refuses to provide court-ordered visitation. It could be argued that courts have created a contradiction by holding on one hand that support and visitation are two separate issues, but then allowing the requirement for payment of support as a condition of visitation in certain cases, especially in the absence of a case to test whether a custody decree requiring visitation as a condition of payment of support would be allowable, even if the parties stipulated to it.

It is not difficult to imagine the position of a father with visitation rights who pays his support, under strict penalty of the law (which may garnish his wages or suspend or rescind his licenses to practice his profession and to drive his car) and backed with the full and aggressive enforcement power of the state, whose only legal recourse if his visitation rights are denied is to hire an attorney and return to court to seek enforcement of the rights to which he is already fully, legally entitled. A custodial parent who refuses to comply with court-ordered visitation might be subject to a custody modification based on frustration or denial of visitation if there has been a change of circumstances, and the law even provides a presumption that interference with visitation is not in the child's best interests[105], but such a custodial parent is generally subject to a charge of criminal contempt of court, which may include a possible misdemeanor fine and imprisonment or other sanctions within the general contempt power of the court.[106] Although Montana does have laws against visitation interference,[107] the statutes are seldom enforced, probably because a primary defense to visitation interference is that an offense does not occur if the custodian acts with reasonable cause, which could conceivably be any action within reason. Punitive approaches such as fines, jailing, and changes of custody for parents are sometimes viewed with disfavor because they may have strong and potentially damaging consequences for the children involved. However, in a recent case, the Supreme Court affirmed a finding that a mother was in contempt of court for denying a father's visitation on 16 occasions and that she had no authority to limit or place any restrictions on visitation beyond those contained in the custody decree. The court held her responsible for payment of the father's attorney fees and his mileage expenses to cover his drive of 110 miles one way for each unsuccessful visitation, even though the fees and costs exceeded the statutory fine for contempt.[108]

Simply put, very little incentive exists for implementing visitation, except in cases in which a custodial parent believes that the child still needs the influence of both parents and is willing to ensure that the child receives that influence. However, because many custody situations involve highly contentious circumstances, having the noncustodial parent physically present may well be a disincentive to providing visitation.

In an effort to mitigate the negative financial and social effects of custodial parents who must rely on welfare if child support is not forthcoming, the state has made support enforcement a strong priority. There is no corresponding negative financial effect on the state budget when a parent is denied visitation. While it is undeniably true that a child is entitled to financial support, a strong case can also be made that a child is equally entitled to the nurturing and emotional support of both parents. The negative effects of visitation denial will not reflect in the welfare rolls, but in the lives of the children who are denied that nurturing and emotional support. In terms of rights granted under a divorce decree, both parents should be equally entitled to rely on enforcement of the provisions of that decree, but the reality is that child support provisions are strongly enforced while the enforcement of visitation rights is virtually nonexistent. For example, it is not difficult to understand why a father might be reluctant to pay support for children he was not allowed to see and with whom he could not maintain a meaningful relationship. Some noncustodial parents contend that support payments would generally be paid more promptly and with less need for strict enforcement measures if they could rely on an equal enforcement of the right to visitation. If the court finding that "a parent should not be able to enjoy the benefits of parental rights while voluntarily shunning the burden of parental obligations" is indeed true, should a custodial parent who is obliged to provide visitation be allowed to voluntarily shun the burden of that responsibility while enjoying the benefits of free, state-sponsored and state-enforced support enforcement laws?

JOINT CUSTODY

Under Montana's joint custody law, "it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing".[109] This does not mean, however, that joint custody is mandated if it is not in the best interest of the child.[110] Further, it has been held that the presumption in favor of joint custody arises only if a party requests it,[111] and the joint custody agreement must be made knowingly and voluntarily. As in the grant of sole custody, the court shall state in its decision to award joint custody the reasons and factors considered in making the award.[112] Despite the statutory provision that a finding that the parents are hostile to each other is not a sufficient basis for denying the award of joint custody,[113] it has nevertheless been held that parental cooperation is a key factor in joint custody and that when there is no cooperation, an award of sole custody is proper even in cases in which one parent maintains that joint custody is necessary because the other parent denied visitation.[114] The law specifically provides for court discretion in directing the parties to consult with appropriate professionals for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy that has arisen in the implementation of a plan for custody.[115] Also, despite the provision that the allotment of time between parents must be as equal as possible,[116] joint legal custody must not be confused with physical custody. Joint custody may involve equal physical custody of the children by both parents or it may entail one parent having substantially more or less actual physical custody than the other parent. Although the

access factor is not a mandatory consideration in joint custody awards, there is no reason why it should not be considered when attempting to arrange for a child's best interest and to facilitate public policy.[117]

Because the child's best interest lies at the basis of every joint custody award, the kinds of physical custody and visitation plans found reasonable by courts are as varied as those approved in sole custody arrangements. For example, courts have held that an equal 6-month division of time between parents was an acceptable joint physical custody arrangement,[118] as was an arrangement limiting the father's visitation to alternate weekends, alternate holidays, an alternate week night, Father's Day, and 3 nonconsecutive weeks in the summer,[119] an allotment of 140 days custody to the father and 225 to the mother,[120] a fixed visitation schedule granting the father about 75 days out of 170 available nonschool visitation days,[121] and an arrangement that physical custody during the school year not be interrupted for a child with learning and physical disabilities.[122] A child's personal preferences as to custodian are not paramount if they are not in the child's best interest, as determined by the court.[123]

A distinction has been made as to the standards applicable to modification of joint custody, allowing the "best interest" standard to be applied when the modification involves an adjustment of conditions within a joint custody arrangement,[124] but requiring application of the "serious endangerment" standard in cases in which termination of joint custody is sought[125] or when a modification will result in a substantial change in the primary residence of the children.[126]

The practical effect of a joint custody arrangement is that, aside from a joint custody parent's accessibility to certain records, joint legal custody is distinguishable from sole custody in name only. Neither joint custody parent is granted any rights superior to a sole custody arrangement--the law is broad enough for a court to fashion virtually any kind of joint custody and visitation arrangement that is viewed as being in the child's best interest, and the same general standards apply to modification of either arrangement. Although there may be a number of factors that contribute to the ever-increasing number of support enforcement actions, the initial hopes of the advocates of joint custody that child support avoidance would be reduced by implementing that concept[127] have not been realized with any measurable success. When the joint custody law was first presented to the Legislature for consideration in 1981, it was touted as a law that "would ensure the minor child flexibility and constant contact with both parents".[128] Contacts with the staff and a review of applicable case law indicate that all the abuses of the system that have arisen in sole custody situations, from child support enforcement problems to jurisdiction problems to visitation problems, can and do arise just as easily in joint custody situations. While espousing a noble purpose in seeking "to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing", the bottom line is that the joint custody preference has had, and will probably continue to have, little measurable effect on marriage dissolutions involving contentious or uncooperative parents and that any benefits to children in joint custody situations will arise only if parents honestly accept all responsibilities of child rearing and overlook their personal differences for the well-being of their offspring.

GRANDPARENT VISITATION

Under Montana law, the District Court may grant to a grandparent of a child reasonable visitation rights, including but not limited to visitation rights regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under marriage dissolution, adoption, or youth court statutes, if the visitation would be in the child's best interest. Grandparent visitation is limited in adoption cases if the child is adopted by a person other than a stepparent or a grandparent. The Department of Public Health and Human Services must be given notice of a petition for grandparent visitation in those cases.[129] In a related instance of grandparental involvement, as of 1995, in cases when it is necessary to remove a child from the child's home, the Department of Public Health and Human Services shall, when it is in the best interest of the child and when the home is approved by the Department, place the child with the child's extended family, which may include grandparents and great-grandparents, prior to placing the child in an alternative protective or residential facility.[130] A court may transfer legal custody of a youth in need of care to a relative, which may include a grandparent, if necessary to protect the welfare of the youth,[131] or, upon termination of parental rights, it may transfer legal custody of a child, with the right to consent to the child's adoption,
to an individual who has been approved by the Department, which may include a grandparent.[132]

As with other court-ordered visitation, there is no statutory definition of what constitutes reasonable grandparent visitation. The best interest of the child is the determining factor. Courts have held as adequate a schedule granting a total of 4 weeks of visitation a year, plus holidays and additional visitation conditioned on the mother's approval.[133] It was held proper for a trial court to disapprove a schedule in the grandparents' home that would subject the child to contact with the father yet would allow the grandparents to visit the child in the mother's home.[134] It was not an abuse of discretion to condition grandparents' visitation upon the simultaneous visitation by the father.[135] Absent allegations of attempted independent great-grandparent visitation or a trial court finding on independent great-grandparent visitation rights, a parent's contention that state statutes did not address great-grandparent or great-great-grandparent visitation rights was considered moot.[136]

OPTIONS

There are some options that the Legislature could exercise to address visitation problems while leaving intact the strong and effective support enforcement statutes. One option might be to create a "visitation enforcement division", similar to the Child Support Enforcement Division, to provide resources and legal help to parents who pay their support but are denied visitation. However, there are some potential problems with such a scheme. The creation of yet another governmental bureaucracy and the funding necessary to implement it might not be favorably received in this time of budgetary uncertainty, particularly when no federal funding exists for this purpose. While the Child Support Enforcement Division can charge a handling fee for each payment of support collected on behalf of any obligee who is not a recipient of public assistance and collect a late payment fee from an obligor for each late payment of support, deducting those fees from the support payment to help defray administrative costs and help ensure that the support enforcement program is at least partially self-supporting, there would be no corresponding penalty available for visitation enforcement since there would be no money collected from visitation enforcement actions. Visitation enforcement would have to be funded either with

the state general fund or by a fee assessed on persons who use the service. In short, it would cost money to underwrite visitation enforcement, with no obvious direct reduction in state budget expenses.

A second option is to include a provision in the support enforcement statutes to specifically consider visitation as part of the hearing process triggered by a support enforcement action. However, a problem with this concept is that a parent would have to be in arrears in support payments before the forum for consideration of visitation problems would be available. Further, the Child Support Enforcement Division would have no available federal funding to implement the hearing process in cases handled by the Division.

A third option might be to allow establishment of a kind of child support "escrow account" into which a noncustodial parent who is not in arrears and thus not subject to child support enforcement actions, but who is nevertheless experiencing visitation problems, could pay support while issues of visitation are investigated and resolved, thereby ensuring the ultimate availability of those funds for the child. If a custodial parent proved that visitation was in fact being provided as required, the funds would then be released. While this option may be precluded by federal law in cases that are administered by the state support enforcement entity and could prove ineffective in AFDC cases, the "escrow account" concept might be workable under certain circumstances. It would allow a noncustodial parent to make support payments on time, thereby avoiding the need for intervention by the Child Support Enforcement Division, but in effect payments would be made "under protest". This process might well facilitate a quick resolution of visitation problems by the parties themselves because of the custodial parent's interest in receiving the support payments. A sanction could be assessed againt a noncustodial parent who used the escrow account to vex a custodial parent.

A fourth option might be to clarify the definition of custody or visitation interference and increase civil penalties for custody or visitation violations, perhaps on an increasing scale of penalties for continued or aggravated visitation interference.

A fifth option might be to require either parent to give notice to and be granted approval of the court before relocation of the permanent residence of the child occurs. Under present law, notice is required to be given by the custodial parent to the noncustodial parent if the residence is changed to another state, but in-state changes are not required to be noticed, nor is notice required to be given to the court itself.

A sixth option might be to require a court to order parents to attend an educational program on dissolution issues, rather than making attendance optional. The program could include a specific discussion of custody and visitation issues as part of the program curriculum so that the parties would be clearly informed of the obligations that visitation will impose on their parenting and of the importance of visitation in the best interest of their child.

A seventh option might be to provide for periodic custody and visitation review in all custody cases, perhaps every 5 years. A provision could be required in every custody decree that at the request of either party, the decree be periodically reexamined by the parties and the court as to the efficacy of custody or visitation provisions.

An eighth option, and one that could potentially relieve a considerable portion of the

heavy court dockets currently devoted to family law issues, would be the establishment of an intermediate family law court of limited jurisdiction that could provide an official forum for the consideration of custody and visitation issues. The court could be similar to the Workers' Compensation Court, perhaps a three-member panel that could examine the facts and provide an interim level of review so that affected parties are given a specific forum to address family issues as they arise. The primary consideration in this option is of course funding, but the proposal would no doubt provide a welcome relief to the parties and the courts. The exercise of option seven, a periodic review, could logically be handled by a family law court.

Short of establishment of an intermediate family law court, a ninth option might be to encourage more and better use of the family law mediator to settle visitation disputes. Costs for using a mediator are apportioned between the parties. The definition of a visitation dispute could be clarified to include a claim that a noncustodial parent is not visiting the child as well as a claim that a custodial parent is denying or interfering with visitation. The family law mediator concept has been law only since 1993, but a directive by the Legislature ensuring that parties are aware of the mediator option and encouraging courts to apply it might facilitate the settlement of visitation disputes.

A tenth option, currently employed by at least one state, is the concept of compensatory visitation, which allows the court to order a custodial parent to permit additional visits to compensate for visitation that is wrongfully denied to the noncustodial parent. The additional visitation must be of the same type and duration as the wrongfully denied visit and must be taken within a reasonable time after the wrongfully denied visit, perhaps within 1 year, at a time acceptable to the person deprived of visitation.

The incidence of visitation enforcement cases might actually be surprisingly small. Many parents do take visitation seriously, understanding that it truly is in the child's best interest to have ongoing, nurturing contact with both parents. Visitation times are no doubt viewed by some custodial parents as a period of respite. In those cases, a problem can arise when a noncustodial parent refuses to exercise the visitation rights. Sadly, some noncustodial parents really are not interested in contact with their children, and visitation is not an issue. However, in those cases when the noncustodial parent has a legal right to visitation and truly wishes to maintain contact but that contact is not allowed or is frustrated, the question could be posed as to whether the Legislature feels it worthy to ensure that both parents are guaranteed the rights of parenthood, as well as the responsibilities, by providing some mechanism to ensure that visitation occurs. This is ostensibly the intent of Montana's joint custody laws, discussed above, but concerns expressed to the staff raise serious questions as to whether the policy is truly effective. In cases of visitation, as in cases of child support, it should be the best interest of the child that receives highest priority.

CONCLUSION

Montana's present child custody and visitation laws are on solid constitutional and legal ground and have developed to a great extent in response to the changing character of the structure of society itself. As the nature of society continues to change, some laws may need to be modified to adjust to those changes. The "best interest of the child" standard provides a very reasonable and prudent basis for legislative decisions in the areas of family law that concern children. That standard should continue to be applied as the

Legislature struggles to adapt legal tenets to the ever-changing and highly contentious arena of child custody and visitation.

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1. sec. 48-104, R.C.M. 1947; sec. 48-202, R.C.M. 1947

2. sec. 48-105, R.C.M. 1947

3. sec. 48-111, R.C.M. 1947

4. sec. 48-112, R.C.M. 1947

5. sec. 48-202, R.C.M. 1974

6. sec. 48-204, R.C.M. 1947

7. sec. 48-205, R.C.M. 1947

8. see 63 A.L.R. 2d 1008

9. see 74 A.L.R. 2d 1073

10. sec. 1, Ch. 232, L. 1963, sec. 48-142, R.C.M. 1947

11. sec. 4, Ch. 232, L. 1963, sec. 48-145, R.C.M. 1947

12. Chapter 238, Laws of 1963, codified as Title 40, ch. 3, MCA

13. sec. 40-3-102, MCA

14. sec. 40-3-111, MCA

15. sec. 7, Ch. 232, L. 1963, sec. 48-148, R.C.M. 1947

16. Sec. 4, Ch. 169, L. 1963

17. Chapter 536, Laws of 1975; codified in pertinent part as Title 40, ch. 4, parts 1 and 2, MCA

18. sec. 40-4-104(1)(b), MCA

19. sec. 40-4-107(3), MCA

20. sec. 40-4-104(1)(d), MCA

21. sec. 40-4-105(1)(e), MCA

22. sec. 40-4-205, MCA

23. sec. 40-4-212, MCA

24. sec. 40-4-213, MCA

25. sec. 40-4-214, MCA

26. sec. 40-4-215, MCA

27. sec. 40-4-216, MCA

28. sec. 40-4-217, MCA

29. sec. 40-4-121(2)(b) through (2)(d), MCA

30. sec. 40-4-218, MCA

31. sec. 40-4-219, MCA

32. sec. 40-4-217(6), MCA

33. sec. 40-4-221, MCA

34. Chapter 17, Laws of 1979, codified as Title 40, ch. 9, MCA

35. sec. 40-4-222, MCA

36. sec. 40-4-224, MCA

37. sec. 40-4-225, MCA

38. Chapter 199, Laws of 1993, codified as Title 40, ch. 4, part 3, MCA

39. sec. 40-4-301, MCA

40. sec. 40-4-302, MCA

41. sec. 40-4-305, MCA

42. sec. 40-4-121(2)(b), MCA

43. Chapter 98, Laws of 1993, codified as Title 41, ch. 7, MCA

44. sec. 41-7-102, MCA

45. sec. 40-4-226, MCA

46. Title 40, ch. 7, MCA

47. sec. 40-4-211, MCA

48. In re Marriage of Irwin, 259 M 176, 855 P2d 525 (1993).

49. sec. 40-7-115, MCA

50. In re Marriage of Appleton, 234 M 345, 763 P2d 658 (1988).

51. Pierce v. Pierce, 197 M 16, 640 P2d 899 (1982).

52. State ex rel. Muirhead v. District Court, 169 M 535, 550 P2d 1304 (1976).

53. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368 (1993); In re Marriage of Cook, 250 M 210, 819 P2d 180 (1991); Maxwell v. Maxwell, 248 M 189, 810 P2d 311 (1991).

54. In re Marriage of Gersovitz & Siegner, 238 M 506, 779 P2d 883 (1989).

55. Weber v. Van De Kop, 228 M 118, 740 P2d 1139 (1987); Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982).

56. In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986).

57. In re Marriage of Smith, 232 M 528, 757 P2d 784 (1988); Meyer v. Meyer, 204 M 177, 663 P2d 328 (1983).

58. In re Guardianship of Gullette, 173 M 132, 566 P2d 396 (1977).

59. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

60. Libra v. Libra, 157 M 252, 484 P2d 748 (1971).

61. In re Marriage of Kovash, 260 M 44, 858 P2d 351 (1993); In re Marriage of Arrotta, 244 M 508, 797 P2d 940 (1990).

62. In re Marriage of Bier v. Sherrard, 191 M 215, 623 P2d 550 (1981).

63. In re Marriage of Speer, 201 M 418, 654 P2d 1001 (1982).

64. R.L.S. & T.L.S. v. Barkhoff, 207 M 199, 674 P2d 1082 (1983).

65. sec. 40-4-219(5), MCA

66. Foss v. Leifer, 170 M 97, 550 P2d 1309 (1976).

67. Gilbert v. Gilbert, 166 M 312, 533 P2d 1079 (1975).

68. Svennungsen v. Svennungsen, 165 M 161, 527 P2d 640 (1974).

69. In re Marriage of Paradis, 213 M 177, 689 P2d 1263 (1984).

70. In re Marriage of Hoodenpyle, 241 M 345, 787 P2d 326 (1990).

71. In re Marriage of Klose, 243 M 211, 793 P2d 1311 (1990); In re Marriage of Morazan, 237 M 294, 722 P2d 872 (1989).

72. sec. 40-6-231, MCA

73. In re Marriage of Johnson, 238 M 153, 777 P2d 305 (1989).

74. In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994).

75. In re Marriage of Lockman, 266 M 194, 879 P2d 710 (1994).

76. Milanovich v. Milanovich, 201 M 332, 655 P2d 959 (1982).

77. In re Marriage of Wang, 271 M 291, 896 P2d 450 (1995).

78. Sanderson v. Sanderson, 191 M 316, 623 P2d 1388 (1981).

79. In re Marriage of Alt, 218 M 327, 708 P2d 258 (1985).

80. In re Marriage of Nash, 254 M 231, 836 P2d 598 (1992).

81. In re Marriage of Corey, 266 M 304, 880 P2d 824 (1994).

82. Romo v. Hickok, 264 M 341, 871 P2d 894 (1994); In re Marriage of Dirnberger, 237 M 398, 773 P2d 330 (1989); Meyer v. Meyer, 204 M 177, 663 P2d 328 (1983).

83. In re Custody of Maycelle D., 213 M 225, 691 P2d 410 (1984).

84. sec. 40-4-217, MCA

85. In re Marriage of Gebhardt, 240 M 165, 783 P2d 400 (1989).

86. In re Marriage of D.F.D & D.G.D., 261 M 186, 862 P2d 368 (1993).

87. In re Marriage of Nalivka, 222 M 84, 720 P2d 683 (1986).

88. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025 (1987).

89. Romo v. Hickok, 264 M 341, 871 P2d 894 (1994); In re Marriage of Cook, 250 M 210, 819 P2d 180 (1991); In re Marriage of Reininghaus, 250 M 86, 817 P2d 1159 (1991).

90. In re Marriage of B.H.J. & D.J., 233 M 461, 760 P2d 753 (1988).

91. In re Marriage of Hunt, 264 M 159, 870 P2d 720 (1994).

92. In re Marriage of Kovash, 260 M 44, 858 P2d 351 (1993). See also In re Marriage of Hunt, 264 M 159, 870 P2d 720 (1994).

93. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192 (1995). See also In re Marriage of Hickey, 213 M 38, 689 P2d 1222 (1984).

94. In re Marriage of Erler, 261 M 65, 862 P2d 12 (1993).

95. In re Marriage of Hickey, 213 M 38, 689 P2d 1222 (1984).

96. In re Marriage of Kovash, 260 M 44, 858 P2d 351 (1993).

97. State ex rel. Sorenson v. Roske, 229 M 151, 745 P2d 365 (1987).

98. Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980).

99. sec. 40-5-162(4), MCA

100. State ex rel. Dewyea v. Knapp, 208 M 19, 674 P2d 1104 (1984).

101. sec. 40-8-111, MCA

102. In re Adoption of J.M.H. & S.B.H., 264 M 381, 871 P2d 1326 (1994); In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135 (1986); In re Adoption of B.L.P., 224 M 182, 728 P2d 803 (1986); In re Adoption of S.L.R., 196 M 411, 640 P2d 886 (1982).

103. C. Mitchell testimony, HB 703, House Judiciary Committee, February 16, 1981.

104. sec. 40-4-212(3)(a), MCA

105. sec. 40-4-219(1)(e), (3), MCA

106. sec. 45-7-309, MCA

107. secs. 45-5-631 through 45-5-633, MCA

108. In re Marriage of Jeppesen, No. 95-036 (unpublished opinion), decided Nov. 21, 1995.

109. sec. 40-4-222, MCA

110. In re Marriage of Cruikshank, 222 M 152, 720 P2d 1191 (1986).

111. In re Marriage of Starks, 259 M 138, 855 P2d 527 (1993).

112. sec. 40-4-223(1)(a), MCA

113. sec. 40-4-224(1), MCA

114. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025 (1987).

115. sec. 40-4-224(4), MCA

116. sec. 40-4-224(2), MCA

117. In re Marriage of Saylor, 232 M 294, 756 P2d 1149 (1988).

118. In re Marriage of Johnson & Turrin, 255 M 421, 843 P2d 760 (1992).

119. In re Marriage of Tonne, 226 M 1, 733 P2d 1280 (1987).

120. In re Marriage of Smyka & Dayton, 227 M 408, 739 P2d 489 (1987).

121. In re Marriage of Ward, 223 M 401, 725 P2d 1211 (1986).

122. In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986).

123. In re Marriage of Ulland, 251 M 160, 823 P2d 864 (1991).

124. In re Marriage of Ferguson, 246 M 344, 805 P2d 1334 (1990).

125. In re Marriage of Gahm & Henson, 222 M 300, 722 P2d 1138 (1986); sec. 40-4-224(3), MCA.

126. In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994).

127. C. Mitchell testimony, HB 703, House Judiciary Committee, February 16, 1981. See Exhibit 3, Conciliation Courts Review, Vol. 18, no. 1, June 1980.

128. Sponsor testimony, HB 703, House Judiciary Committee, February 16, 1981.

129. sec. 40-4-217(2), MCA; sec. 40-9-102, MCA

130. sec. 41-3-101(4), MCA

131. sec. 41-3-406(1)(c)(iii), MCA

132. sec. 41-3-607(1), MCA

133. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025 (1987).

134. Kanvick v. Reilly, 233 M 324, 760 P2d 743 (1988).

135. In re Marriage of Kovash, 260 M 44, 858 P2d 351 (1993).

136. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018 (1994).